

# EUROPEAN PRINCIPLES GOVERNING NATIONAL ADMINISTRATIVE PROCEEDINGS

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## I

### INTRODUCTION

The transition from the original monist to the contemporary pluralist model of administrative organization has clearly affected the discharge of European Community ("Community") activities.<sup>1</sup> In the original, unitary framework of Community administrative organization, activities were carried out on the basis of fixed, pre-determined criteria. The original model was replaced by a multi-organizational framework, which made it necessary to articulate decisionmaking criteria more responsive and sensitive to different public purposes.<sup>2</sup> As a result, administrative proceedings have become more diverse and their rules more numerous and complex. The administrative proceeding has come to hold a prominent position in the legal discourse, at both the national and the Community levels.

The subject of administrative proceedings was originally given little regard. The founding Member States of the Community traditionally considered only the final conclusive act or decision of an administrative proceeding to be legally relevant. The preparatory proceedings assumed a marginal value because they were governed by the criteria of good organization, rather than by legal criteria. Similarly, procedural defects were important only insofar as they contributed to the invalidity of the administrative act or decision.<sup>3</sup> This orientation also took root at the supranational level. As a result, activities leading to conclusive administrative acts or decisions had merely internal significance and were thus considered irrelevant in the relationship between the administration and the individual.

Particular features of the original Community also tended to undermine the importance of administrative proceedings. For example, the first version of the Treaty Es-

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1. For an analysis of these developments in the administrative order of the European Community, see E. CHITI and C. FRANCHINI, *L'INTEGRAZIONE AMMINISTRATIVA EUROPEA*, Ch. 1 (2003).

2. Recent works describing the multi-organizational framework include S. Cassese, *La signoria comunitaria sul diritto amministrativo*, 12 *RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO* 291, 292 (2002), S. CASSESE, *LE BASI DEL DIRITTO AMMINISTRATIVO* 316 (2000), and C. Franchini, *I principi dell'organizzazione amministrativa comunitaria*, 3 *RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO* 651, 653 (2003).

3. On the modest importance initially given to issues arising out of the Community administrative proceeding, see M.P. CHITI, *DIRITTO AMMINISTRATIVO EUROPEO* 302 (1999).

tablishing the European Community ("EC Treaty"), structured the Community as a legal order with particular ends.<sup>4</sup> Thus, the EC Treaty seemed to be concerned only with acts. The original Community also failed to distinguish between legal acts and administrative acts, and generally tended to de-emphasize the latter. Finally, the Community's limited bureaucratic structure, built upon the principle of indirect implementation of Community policies by the Member State administrations, lacked the resources to devote serious attention to administrative law issues.

Recently, more attention has been paid to administrative law in the Community. Two factors can account for the change. First, national laws have been enacted to govern the proceedings. These laws can be general but can also be organic and detailed.<sup>5</sup> Second, following the expansion of Community activities, the Community system became a general legal order similar to those of nation-states. Consequently, the role of administration and administrative proceedings expanded.

Forms of joint administration and cooperation have emerged out of the implementation of the principle of subsidiarity and the related criteria of concurrent competences. The result has been a marked increase in detailed administrative procedures in both the Community and the national arenas. However, Community legislators and judges, like their national counterparts, have also contributed to the development of administrative procedure law by regulating specific areas, such as the right of access to documents, and by generalizing rights derived from administrative proceedings in a particular sector, such as public contracts. Moreover, the Court of Justice has affirmed that general EC Treaty principles also apply to administrative proceedings and that there is a clear separation between administrative and law-making functions.

Thus, the initial approach of disregarding administrative proceedings has given way to a much greater awareness of them. Moreover, the subject has now become central to an understanding of the Community legal system.

## II

### THE LAW GOVERNING PROCEEDINGS AT THE COMMUNITY LEVEL

The law governing administrative proceedings at the supranational level is derived from both Community legislation and the jurisprudence of the European Courts. Each institution has made a unique contribution to European administrative law.

There is no general, statutory, or constitutional law of administrative procedure. However, some constitutional provisions bear indirect relevance. There are also sectoral norms of a constitutional nature which contain specific prescriptions.

With respect to the general, constitutional provisions, it is necessary to distinguish between the norms contained in the Charter of Fundamental Rights of the European

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4. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, 1997 O.J. (C 340) 3 [hereinafter EC TREATY].

5. A comprehensive examination of this position can be found in A. Sandulli, *Il procedimento*, in 2 TRATTATO DI DIRITTO AMMINISTRATIVO 1035 (S. Cassese ed., 2d. ed., 2003).

Union (“Charter of Fundamental Rights”) and those envisaged by the treaties.<sup>6</sup> Articles 41, 42 and 47 of the Charter of Fundamental Rights promote the principle of legality by providing for the duty of impartiality, the obligation of the Administration to give reasons for its decisions, the right to a remedy, the right to be heard, the right to access one’s files, and the right of defense.<sup>7</sup> Articles 220 and 230 of the EC Treaty implicitly affirm the principle of legality through their references to “the law” and “legality.”<sup>8</sup> The European Courts now interpret these Articles to mean that administration must not only comply with specific laws but must also base its activities on the EC Treaty and European laws passed pursuant to the Treaty.<sup>9</sup> In this way, the principle of legality comes to define the legitimacy of administrative activity.<sup>10</sup> This principle has, in turn, promoted more specific principles, like administrative impartiality, which requires the administration to be politically neutral. Impartiality is an organizational criterion for ensuring free competition and the effectiveness of the common market.<sup>11</sup> Additionally, the principle of legality has advanced the principle of good administration, which requires diligence and efficiency of Community institutions.<sup>12</sup>

Basic elements of the principle of equality are set forth in Article 3(2) of the EC Treaty on the activities of the Community, and Articles 12 and 13 on discrimination on the basis of nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.<sup>13</sup> These principles, applied to administrative proceedings, are

6. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, 2000 O.J. (C 364 )1, arts. 41, 42, and 47 [hereinafter CHARTER].

7. For the general definition and explication of the various procedural principles mentioned here, see Sandulli, *supra* note 5, at 1067.

8. EC TREATY arts. 220, 230.

9. See, e.g., Joined Cases C-48/87 and C-227/88, Hoechst AG v. Commission, 1989 E.C.R. 2919 (understanding that any intervention by public authorities into the sphere of private activities must have a legal basis). See also, Case C-101/78, Granaria B.V. v. Hoofdproductieschap voor Akkerbouwprodukten, 1979 E.C.R. 623, and Case C-294/83, Les Verts v. Parliament, 1986 E.C.R. 1339.

10. On the principle of legality in the Community legal order, see A. Weber, *Il diritto amministrativo procedimentale nell'ordinamento della Comunità europea*, 2 RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 393, 393 (1992); see also A. Massera, *L'amministrazione e i cittadini nel diritto comunitario*, 1 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 683 (1993), and A. Massera, *I principi generali*, in TRATTATO DI DIRITTO AMMINISTRATIVO EUROPEO 431.

11. In general terms, the principle of impartiality requires equal treatment of analogous cases, unless there is an adequate justification for disparate treatment. The principle also respects the general criteria established in the past or followed in similar factual situations. See Case C-119/97, *Francaise de l'Express (Ufex) v. Commission*, 1999 E.C.R. I-1341, Case T-80/97, *Starway SA v. Council*, 2000 E.C.R. II-3099; see also E. Picozza, *Alcune riflessioni circa la rilevanza del diritto comunitario sui principi del diritto amministrativo italiano*, 4 RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 1227 (1992).

12. Case C-60/81, *IBM v. Commission*, 1981 E.C.R. 2639, Case T-105/96, *Pharos SA v. Commission*, 1998 E.C.R. II-285, and Case T-31/99, *ABB Asea Brown Boveri v. Commission*, 2002 E.C.R. II-1881.

13. EC TREATY arts. 3(2), 12-13. At the Community level, the relationship between the principle of equality and the principle of impartiality is much more evident than at the national one; various aspects of this are examined in G. Tesaro, *Eguaglianza e legalità nel diritto comunitario*, 1 *Diritto Dell'Unione Europea* 1, 1 (1999).

generally understood as requiring that the administration act impartially and properly weigh all the interests involved when exercising discretionary power.<sup>14</sup>

Other articles of the EC Treaty also set forth fundamental principles. Article 5 sets down the principle of proportionality, expressly providing that Community action shall not go beyond what is necessary to achieve enumerated EC Treaty objectives.<sup>15</sup> This prohibits Community institutions from imposing more duties and restrictions than are strictly required.<sup>16</sup> Article 10 sets forth the principle of loyal cooperation between Member States and Community institutions, by which the European Commission ("Commission") defines obligations and policies to be fulfilled by the national administrations.<sup>17</sup> According to this principle, the Member States must adopt all appropriate measures, whether general or particular, to ensure the fulfillment of Community policies and laws, and must abstain from any measure that might jeopardize the attainment of Community objectives.<sup>18</sup> Article 5 affirms the principle of subsidiarity, which requires that power be exercised at the territorial level best-suited to the effective realization of common objectives.<sup>19</sup> The principle affects the division of tasks between the community, national, and local levels of administration. It involves administrative law because it is easier to evaluate the three elements on which subsidiarity is based—sufficiency, scale, and effect—at the administrative level than at the legislative one.<sup>20</sup>

The EC Treaty also includes several provisions which are more specific, but just as important. For example, Article 253 establishes the duty to state the reasons upon which Community acts are based and, indirectly, the duty to make them public.<sup>21</sup>

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14. See, e.g., Joined Cases C-117/76, *Ruckdeschel & Co. v. Hauptzollamt Hamburg-St. Annen* and C-16/77, *Diamalt AG v. Hauptzollamt Itzehoe*, 1977 E.C.R. 1753, in which the Court expressly affirms that the principle of equality must be considered as a basic principle of Community law. For a recent decision by the Court of First Instance, see Case T-23/99, *LR af 1998 A/S, formerly Løgstør Rør A/S v. Commission*, 1998 E.C.R. II-1705.

15. EC TREATY art. 5.

16. See Case C-426/93, *Federal Republic of Germany v. Council*, 1995 E.C.R. I-3723; and recently, Case C-491/01, *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd.*, 2002, at <http://www.curia.eu.int>. On the principle of proportionality, see D.U. Galetta, *Il principio di proporzionalità nella giurisprudenza comunitaria*, 4 RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 837 (1993); see also D.U. GALETTA, *PRINCIPIO DI PROPORZIONALITÀ E SINDACATO GIURISDIZIONALE NEL DIRITTO AMMINISTRATIVO* 1 (1998), and see generally A. SANDULLI, *LA PROPORZIONALITÀ DELL'AZIONE AMMINISTRATIVA* (1998).

17. EC TREATY art. 10.

18. Acting in this way, Community and national institutions are called upon to cooperate in the exercise of administrative activity for the fulfillment of common objectives. A recent decision is Case C-275/00, *Commission v. First NV*, 2002, at <http://www.curia.eu.int>.

19. EC TREATY art. 10.

20. See Case C-377/98, *Kingdom of the Netherlands v. Parliament*, 2001 E.C.R. I-7079. For commentary, see S. Cassese, *L'aquila e le mosche: Principio di sussidiarietà e diritti amministrativi nell'area europea*, 5 *Foro italiano* 377 (1995), see also M.P. Chiti, *Principio di sussidiarietà e diritto amministrativo*, 3 *Diritto pubblico* 505 (1995), and P. DE CARLI, *SUSSIDIARIETÀ E GOVERNO ECONOMICO* 3 (2002).

21. EC TREATY art. 253. The Court of Justice has regarded this duty as a substantial element of the administrative proceeding. It implies the duty to give the factual and legal reasons for a decision, with the twofold purpose of enabling interested parties to know the administration's position, and enabling Community judges to review the legitimacy of the decisions adopted. See Case C-18/57, *Nold Kg v. Authority of the European Coal and Steel Community*, 1959 E.C.R. 89. See also Case C-367/95, *Commission v. Chambre Syndicale Nationale*

Similarly, Articles 262 and 265 impose a duty of consultation upon the Commission and the European Council (“Council”).<sup>22</sup> Finally, Article 274(1) sets forth the duty of sound financial management to ensure effectiveness and efficiency in the use of appropriations.<sup>23</sup>

Last, Articles 6(2) and 46 of the Treaty promote the principle of legality by expressly addressing questions arising out of the issue of fundamental rights.<sup>24</sup> These provisions set down a general commitment for the institutions to respect fundamental rights. From this, more specific rights applicable to administration have been derived. These Articles, and the Court of Justice jurisprudence that they have inspired, fully affirm the principle of fair proceedings.<sup>25</sup> This principle suggests that, when circumscribing citizens’ rights, the administrative authority must ensure that such limitations are concrete and imposed pursuant to an administrative proceeding in which the citizens have the opportunity to be heard.<sup>26</sup>

Ordinary sectoral norms aim to regulate administrative proceedings on an individual basis.<sup>27</sup> The norms do not go so far as to create a general law or a “tight web,” but rather expose the extent to which Community law might be said to remain “spotty.”<sup>28</sup> Examples of such norms include Council Regulation 1/2003, which regulates Commission competition proceedings and which affirms the principle of proportionality, sets down rules for conducting inspections, details the rights of defense, and requires that the parties receive notice of the Commission’s decisions.<sup>29</sup> Council Regulation 1049/2001 asserts the principle of the right of access to administrative documents.<sup>30</sup> The law governing the Community trademark, Council Regulation 40/94, provides that the Office for Harmonization in the Internal Market (trade marks and designs) shall state the reasons upon which its decisions are based.<sup>31</sup> The law on Community plant variety rights, set forth in Council Regulation 2100/94, applies the principle of loyal cooperation to require mutual assistance between the supranational and national administrations.<sup>32</sup> Finally, the law on Community statistics, contained in Council

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des Entreprises de Transport de Fonds et Valeurs (Sytraval), 1998 E.C.R. I-1719, and Court of First Instance Case T-199/99, *Sgaravatti Mediterranea S.r.l v. Commission*, 2003, at <http://www.curia.eu.int>.

22. EC TREATY arts. 262, 265. In the specific case, the Economic and Social Committee and the Committee of the Regions.

23. EC TREATY art. 274(1).

24. EC TREATY arts. 6(2), 46.

25. See *Joined Cases C-238/99, Limburgse Vinyl Maatschappij NV, C-244/99, DSM NV, C-245/99, Montedison SpA, C-247/99, Elf Atochem SA, C-250/99, Degussa AG, C-251/99, Enichem SpA, C-252/99, Wacker-Chemie GmbH, and C-254/99, Imperial Chemical Industries plc (ICI)*, at [www.curia.eu.int](http://www.curia.eu.int).

26. See, e.g., Court of First Instance Case T-7/92, *Asia Motor France v. Commission*, 1993 E.C.R. II-669 and, more recently, Case T-206/99, *Métropole Télévision SA v. Commission*, 2001 E.C.R. II-1057.

27. This underscores the importance of positive law, equally important as judge-made law. See S. Cassese, *La signoria comunitaria sul diritto amministrativo*, 12 RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 291, 301 (2002).

28. See Weber, *supra* note 10, at 396.

29. Council Regulation 1/2003, arts. 20(8), 27, 30, 2003 O.J. (L 1) 1.

30. Council Regulation 1049/2001 on Public Access to European Parliament, Council, and Commission Documents, 2001 O.J. (L 145) 43.

31. Council Regulation 40/94 on the Community Trademark, art. 73, 1993 O.J. (L 11) 1.

32. Council Regulation 2100/94 on Community Plant Variety Rights, art. 91, 1994 O.J. (L 227) 1.

Regulation 322/97, affirms the principles of impartiality, reliability, relevance, cost-effectiveness, and transparency.<sup>33</sup>

Rules established by constitutional or ordinary lawmaking power are supplemented by a body of administrative law emanating from the Commission. These rules govern the exercise of discretionary power, rather than the interests of private individuals. In other words, they curb the Commission's discretion,<sup>34</sup> but they do not, however, give individuals legal rights to challenge Commission decisions in court.

Since the legislation governing administrative proceedings is piecemeal, jurisprudence has assumed great importance. What common principles there are tend to emerge from the courts. It is difficult to deduce general rules for administrative activity from judgments in individual cases, since they do not lend themselves to systematic conclusions. However, the jurisprudential decisions still contribute to a framework of administrative law and therefore deserve careful attention. The decisions are based on comprehensive rules that are applied to concrete cases. The repeated application of these rules, and their relationship to constitutional norms, qualify them as positive law principles that are binding on national administrations.<sup>35</sup>

Community jurisprudence serves to fill gaps in existing law and also to create new law. The principles put forward by written norms, as well as those derived from jurisprudence, are sources of Community law.<sup>36</sup> The jurisprudential function is particularly important in the area of the administrative proceeding, in which the law is in-

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33. Council Regulation 322/97 on Community Statistics, art. 10, 1997 O.J. (L 52) 1. This article merits particular attention because it provides definitions of the principles themselves. It specifies that impartiality means an objective and independent manner of producing Community statistics. The statistics are to be compiled without pressure from political or other interest groups, particularly in regard to the selection of techniques, definitions and methodologies best suited to the attainment of the objectives. It also implies the availability of statistics, with a minimum delay, to all users, including Community institutions, governments, social and economic operators, academics and the public in general. Reliability is the requirement that of Community statistics reflect, as faithfully as possible, the reality they are designed to represent. In order to ensure reliability, scientific criteria are used for the selection of sources, methods, and procedures. Relevance means that the production of Community statistics is a function of clearly defined Community objectives. These objectives determine the fields, timeliness and scale of statistics, which should acknowledge new demographic, economic, social, and environmental developments at all times. Data collection should be limited to what is necessary for attaining the desired results. Cost-effectiveness means the optimum use of all available resources and the minimization of the burden on respondents. The amount of work and the costs that the production of statistics requires should be in proportion to the importance of the results and benefits sought. Transparency means the right of respondents to have information on the purposes for which the data are required and the protective measures adopted.

34. See G. della Cananea, *L'amministrazione europea*, in 2 TRATTATO DI DIRITTO AMMINISTRATIVO. DIRITTO AMMINISTRATIVO GENERALE 1797 (S. Cassese ed., 2003) (examining the related questions and issues of the legitimacy of the Commission's function). For a comprehensive view, see H. Adam and G. Winter, *Commission Guidance Addressed to Member States Agencies*, in SOURCES AND CATEGORIES OF EUROPEAN COMMUNITY LAW 625 (G. Winter ed., 1999).

35. See CASSESE, *supra* note 2, at 317. But see C. FRANCHINI, IL CONTROLLO DEL GIUDICE PENALE SULLA PUBBLICA AMMINISTRAZIONE 95 (1998).

36. See M.P. Chiti, *Are There Universal Principles of Good Governance?* 1 EUROPEAN PUBLIC LAW 241 (1995).

complete. The European Courts' decisions set down general rules that must be followed by Community administration.<sup>37</sup>

An analysis of decisions of the European Courts reveals many general principles that apply to administrative proceedings. Examples include the principle of legal certainty, according to which individuals must be able to rely upon the clear wording of the rule governing their conduct so that they can foresee the legal consequences of their actions.<sup>38</sup> Similarly, a principle of legitimate expectations protects individuals' established interests, particularly when the facts justify a reasonable expectation on the part of those individuals affected by Community measures.<sup>39</sup> There is also a duty on administrations to carefully and impartially examine the relevant facts, interests, and questions of law before adopting a decision.<sup>40</sup> Individuals are also guaranteed the right of defense, meaning that interested parties may make their views known in the course of a proceeding and have the right to receive a response from the competent institution.<sup>41</sup> Other principles and rights include the principle of a reasonable time-limit, which must be evaluated in light of the particular circumstances of each case; the right to a reasoned decision; the right of access to files, under which interested parties may examine the documents gathered in the course of the proceeding, which is connected to the principle of access to administrative documents; the right to be heard, which takes the concrete form of a right to properly express one's reasons before the rule or decision is adopted or implemented; and finally, the principle of preventive action, which requires administrative authorities to adopt appropriate measures in order to avoid possible health, safety, or environmental risks.<sup>42</sup> Some principles listed above

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37. From this standpoint see H.P. NEHL, *PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW 1* (Oxford, 1995), demonstrating how the administrative proceeding is an expression of a legal order subjected to the rule of law.

38. See Court of First Instance, Case T-37/97, *Forges de Clabecq v. Commission*, 1997 E.C.R. II-859, *see also*, Case C-205/01, *Commission v. Kingdom of the Netherlands*, 2001, at <http://www.curia.eu.int>.

39. See Case 78/77, *Luhrs v. Hauptzollamt Hamburg-Jonas*, 1978 E.C.R. 169; *see also* the Court of First Instance, Case T-94/00; *Rica Foods (Free Zone) NV v. Commission*, 2002 E.C.R. I-09011; and Case C-334/99, *Federal Republic of Germany v. Commission*, 2003 E.C.R. I-01139. This principle is akin to American administrative law on retroactivity.

40. See Case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, 1991 E.C.R. I-5469; *see also* Court of First Instance, Case T-71/93, *Langnese v. Iglo GmbH*, 1995 E.C.R. II-1533; Case T-14/96, *Bretagne Angleterre Irlande (BAI) v. Commission*, 1999 E.C.R. II-139.

41. See Case 32/63, *Alvis v. Commission*, 1963 E.C.R. 97; *see also* Case 17/74, *Transocean Marine Paint Association v. Commission*, 1974 E.C.R. 1079. For more recent cases see Case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, 1991 E.C.R. I-5469; Court of First Instance Case T-205/99, *Hyper Srl v. Commission*, 2002, at <http://www.curia.eu.int>.

42. For time limit cases see Court of Justice, Case C-136/92, *Commission v. Brazzelli Lualdi*, 1994 E.C.R. I-1981; Case C-238/99, *Limburgse Vinyl Maatschappij NV (2002)* at [www.curia.eu.int](http://www.curia.eu.int). For the approach of the European Court of Human Rights see *Garyfallou AEBE v. Greece*, 18996/91 Eur. Ct. H.R. 74 (1997). For the right to a reasoned decision see Court of First Instance, Case T-16/91, *Rendo v. Commission*, 1996 E.C.R. II-1827. For document access rights see Court of Justice, Case 51/92, *Hercules Chemicals v. Commission*, 1999 E.C.R. I-4235; *see also* Court of First Instance, Case T-205/99, *Hyper Srl v. Commission*, 2002, at [www.curia.eu.int](http://www.curia.eu.int), which affirms this principle in the area of a wider right to defense. It is not without reason that European Parliament and Council Regulation 1049/2001 regarding Public Access to European Parliament, Council and Commission Documents, 2001 O.J. (L 145) 1, expressly provides that the policy of transparency set forth in Article 1(2) of the EC Treaty must enable "citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more

have a specific origin, such as the principle of proportionality, which is drawn from the German system. Other principles, such as legal certainty, are common to all the Member States. Still others are acquiring a unique meaning in Community law, although sometimes the supranational meaning is derived from a re-evaluation of principles at the national level.<sup>43</sup>

### III

#### THE RULES AND PRINCIPLES GOVERNING COMMUNITY ADMINISTRATIVE PROCEEDINGS AND THEIR APPLICABILITY TO NATIONAL ADMINISTRATIVE PROCEEDINGS

The Community legal system tends to distinguish between general principles, which are common to legal and administrative proceedings, and those principles that apply only to administrative proceedings.<sup>44</sup> The common principles include: (1) legality; (2) impartiality; (3) subsidiarity; (4) proportionality; (5) the duty to motivate decisions; (6) legal certainty; (7) legitimate expectations; and (8) fundamental rights. Specific administrative principles are: (1) good administration; (2) the duty of sound financial management; (3) precision and completeness in presenting the relevant facts and interests; (4) the right of defense; and (5) the duty to state reasons and access to administrative documents. However, these distinctions may be grounded more in theory than in practice. For example, the distinctions between the principles of legality, legal certainty, and the protection of legitimate expectations often become blurred when applied to specific cases. Similarly, the principles of equality and impartiality are closely connected, as are the principles of good administration and the sound use of financial resources. Furthermore, it is quite difficult to precisely define the principles themselves. In the absence of general legislative rules, principles are defined through an empirical or case law method. Such methods make it difficult to bring the principles under a unitary conceptual framework.

Despite the questionable usefulness of categorizing the different principles, many Member States share the Community's classification system. For example, in Italy there is a similar distinction between absolute principles common to legal and administrative proceedings (legality, impartiality, good administration, reasonableness, and proportionality) and other principles applied only to administrative proceedings (fair-

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accountable to the citizen." For the right to be heard, see Court of Justice, Case 14/74, *Transocean Marine Paint Association v. Commission*, 1974 E.C.R. 1079; *see also* Case 85/76, *Hoffman-La Roche v. Commission*, 1979 E.C.R. 462. For the principle of preventive action see Court of Justice, Case C-180/96, *United Kingdom v. Commission*, 1998 E.C.R. I-2265.

43. The principle of access to administrative documents is one such example. The importance of Community jurisprudence can be confirmed by quantitative data. In 2000-02, the Court of Justice and the Court of First Instance issued over 1,100 decisions, not counting those of the Court of First Instance in the area of employment litigation involving Community institutions. Of those decisions, around 700 consider, to some degree, the subject of administrative proceedings (over 270 in 2000; over 180 in 2001; and over 240 in 2002). This means that the European courts have had to address the topic of administrative law in about sixty-four percent of their cases. The data cited are taken from the official site of the European Union, at <http://www.europa.eu.int>.

44. *See* della Cananea, *L'amministrazione europea*; *see also* della Cananea, *I procedimenti amministrativi della Comunità europea*, in *TRATTATO DI DIRITTO AMMINISTRATIVO EUROPEO* 226.



ness, participation, good faith or protection of legitimate expectations, publicity, representation of the preliminary motions, speed, accountability, economy, efficiency, efficacy, and simplicity).<sup>45</sup> However, the overlap between the Community legal system and national ones is not complete. While Member States generally affirm the same principles as the Community, they are applied differently. National proceedings, governed by national legislation, affirm general principles like impartiality, neutrality, publicity, equity, reasonableness, proportionality and the duty to state reasons, while principles at the Community level are derived mainly from jurisprudence or the administration itself. But the real difference lies in the peculiarity of the Community legal order and from the fact that the legal experiences and the administrative structures are not the same.

The composite administrative proceeding serves as a good illustration of how similar principles are applied differently in the Community and Member States. The Community administrative proceeding aims to integrate different, and sometimes conflicting, points of view within a single forum.<sup>46</sup> This has been realized through the organization of functions into procedural steps in which the Commission and the national administrations participate. These actors are thus integrated through organizing mechanisms aimed at promoting the joint development of common functions.<sup>47</sup>

Composite proceedings are organized into different phases, which unfold at different levels, but always within a unitary context.<sup>48</sup> Sometimes they commence at the Community level and then proceed to the national one.<sup>49</sup> In other cases, the proceedings begin at the national level and then move into the Community forum.<sup>50</sup> Still other composite proceedings manifest overlapping phases, where they are carried out in supranational institutions in some cases and national institutions in others.<sup>51</sup>

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45. See CASSESE, *supra* note 2, at 317; see also della Cananea, *L'amministrazione europea*, demonstrating three aspects of the Community legal regime: (1) the fact that it is does not hinge on the principle of legality, in the broad sense; (2) the ability of unwritten norms to serve as a parameter of legitimacy; and (3) the peculiarity of the system of remedies. The reality, however, seems to be otherwise: the first point is the fruit of an excessively formal proposition; the second is common to national legal systems (for example, the case of proportionality); and the third is only apparent, because there are differences, but individuals are protected equally. So, while there are differences, they are not substantial ones.

46. Following a typical dynamic of complex organizations, the original model has changed over the years. This is due to a change in initial conditions, which made it necessary to adapt the mechanisms of direct Community implementation, joint administration, oversight, and control, in order to integrate the national administrations with the Community one. See Franchini, *I principi dell'organizzazione amministrativa comunitaria*, at 651.

47. In comparison see Franchini, *supra* note 2, at 651.

48. On the variability of the functions of the composite proceeding and the difficulty of categorizing them, see M.P. Chiti, *I procedimenti composti nel diritto comunitario e nel diritto interno*, in *ATTIVITÀ AMMINISTRATIVA E TUTELA DEGLI INTERESSATI. L'INFLUENZA DEL DIRITTO COMUNITARIO* 55 (Giappichelli ed, 1997).

49. This is the case in Council Regulation 1260/01 concerning Certain Protection Measures with Regard to Foot and Mouth Disease in France, 2001 O.J. (C 350) 105.

50. One example is Council Regulation 2081/92 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, 1992 O.J. (L 208), 1-8.

51. An example is Directive 2001/18/EC of the European Parliament and of the Council on the Deliberate Release into the Environment of Genetically Modified Organisms, 2001 O.J. (L 106) 1. From this standpoint, composite proceedings can be distinguished from proceedings in which the supranational and national authori-

A comparison between Community and domestic administrative proceedings shows that the legal principles they apply are substantially the same. They are used to (1) protect legal entitlements from the arbitrary exercise of administrative power, (2) balance the public and private interests involved, and (3) promote the cooperation and coordination between the national and supranational administrations. What differences there are tend to be structural rather than substantive. Thus, the legal principles vary in the institutional entities to which they apply—Community bodies versus national bodies—and the actors they condition—Member States and private parties versus private parties alone. And, contrary to domestic administrative proceedings, European administrative proceedings almost never conclude at the European level, but rather at the national one. A comparison also reveals that the type of action accomplished through Community and national proceedings differs. At the Community level, laws contain general prescriptions for how to allocate funds and other areas of Community administration. In contrast, at the Member State level, laws authorize administrative action with respect to private actors, such as the granting of benefits and the provision of services. In other words, supranational and national authorities pursue different objectives.

As has been recently argued,<sup>52</sup> Community institutions began developing an administrative function in the 1980s, sometimes acting directly, but more often together with the national administrations. In other cases, Community institutions would use national administrations to pursue Community objectives, while setting forth organizational and procedural mechanisms to constrain their actions. Thus, models for the joint exercise of Community powers were minted. These models have now been codified by supranational law.<sup>53</sup> The latest legislation, still in the course of development, is aimed at introducing regulatory systems based upon the institution of an independent Community body and a European group of national regulators.<sup>54</sup>

#### IV

##### COMMON GENERAL PRINCIPLES AS UNIFYING ELEMENTS AND RECENT DEVELOPMENTS

The Community legal system's regard for the administrative proceeding has evolved along lines similar to many national legal systems.<sup>55</sup> Determinate rules and

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ties only participate instrumentally, to promote their national or supranational interest, at the most appropriate phase. For example, Council Regulation 40/94 on the Community Trademark, 1994 O.J. (L 11) 1, provides for the participation of different actors at different phases, such as the Office for Harmonization in the Internal Market (trade marks and designs) and the central industrial property office of an interested Member State, within a single, statutory legal framework. On this subject, see the accurate analysis of E. CHITI, *LE AGENZIE EUROPEE. UNITÀ E DECENTRAMENTO NELLE AMMINISTRAZIONI COMUNITARIE* 81 (2002).

52. See Chiti and Franchini, *supra* note 1, at 11.

53. For an analytic approach see Chiti, *supra* note 51, at 81.

54. See S. Cassese, *Il concerto regolamentare europeo delle telecomunicazioni*, 5 *Giornale di diritto amministrativo* 689 (2002). But see F. Scharpf, *Verso una teoria della multi-level governance in Europa*, 1 *RIVISTA ITALIANA DI POLITICA PUBBLICA* 13 (2002).

55. A comparison can be made to Italy's administrative proceedings prior to the enactment of Law 241/1990 on Administrative Procedure and Rights of Access to Administrative Documents. There are also par-

principles emerge out of the case law, while legislation is limited to specific measures addressed to particular factual situations.<sup>56</sup> The repeated judicial declarations of principles have established them as real positive law, binding upon national administrations.<sup>57</sup>

In contrast to the Member States, where administrative law and procedural rules evolved over a long period of time, Community laws and regulations are recent, dating to the 1950s. The Community institutional model manifested an evolving equilibrium between national and intergovernmental needs, rather than a precise plan. Because this model lacked a definitive constitutional framework setting out the functions and powers of the Community, the choice of a limited administration was inevitable. A transfer of sovereign functions from national legal systems to the Community occurred only after the integration process progressed with the Single European Act and the European Court of Justice's expansive construction of Community powers.<sup>58</sup>

Now administrative activity is assuming greater importance, mainly through the positive reinforcement between Member States and the Community. Member States' legal systems influence Community law by filling in the gaps at the supranational level. In turn, the Community legal system conditions national legal orders by shaping their organizational and functional framework to promote integration.<sup>59</sup> Member States also apply general Community principles since these principles have the status of law, and national administrations and courts are required to comply with Community legal rules.<sup>60</sup>

The withering of the traditional distinction between direct and indirect administration has complicated the relations between the different levels of administration. The Community and Member States now frequently share concurrent powers, whereby public actors intervene along more or less equal lines.<sup>61</sup> However, proposals privileging a division of tasks between the Community administration and national administrations abound. One suggestion is for the two entities to perform functionally differ-

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allels outside of administrative law, like organization, *see, e.g.*, Franchini, *I principi dell'organizzazione amministrativa comunitaria*, at 656.

56. It is precisely in relation to the diversity of origins that it is possible to explain, among other things, why a wide debate has emerged on whether such principles should be codified. The main lines of this debate are traced in della Cananea, *I procedimenti amministrativi della Comunità europea*, at 226.

57. According to the European courts, respect for the general principles of Community law is incumbent upon every national authority. Case C-316/86, *Hamburg-Jonas v. Krücken*, 1988 E.C.R. 2213.

58. SINGLE EUROPEAN ACT, 1987 O.J. (L 169) 1.

59. On the importance of factors of legal unification, *see* J.P. Costa, *Les respect des droits fondamentaux*, 3 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 905 (2002).

60. Community rules are adopted in different ways in different national systems. Regulations are applicable directly, whereas directives need to be transposed by national legislation. National judges are obliged to apply Community rules, although they tend to refer, more or less exclusively, to national law. For an affirmation of the direct relevance of Community principles, and their relation to national law, *see* Case C-103/88, *Fratelli Costanzo SpA v. Comune di Milano*, 1989 E.C.R. 1839.

61. One example comes out of the food safety sector, European Parliament and of the Council Regulation 178/2002 laying down the General Principles and Requirements of Food Law, establishing the European Food Safety Authority, and laying down Procedures in Matters of Food Safety, 2002 O.J. (L 31) 1.

ent tasks in the policy chain, so that the Community administration makes decisions while the national authorities execute them.<sup>62</sup>

Faced with complexity, and lacking in a general law, the European Courts have performed a fundamental function by helping administrative proceedings penetrate society and thereby legitimate democratic power.<sup>63</sup> The fragmentary nature of Community norms addressing administrative proceedings has left room for the judicial elaboration of administrative procedure principles.<sup>64</sup> Although this jurisprudence refers to specific types of proceedings, such as disciplinary proceedings or proceedings in the competition and antidumping sectors, the legal principles that result are almost always general in character. The cross-cutting nature of such principles derives from the fact that they are all inspired by the very same concern: the need to guarantee the effective implementation of Community law.

Recently, Community laws have been enacted that declare general principles applicable to national administrative proceedings.<sup>65</sup> This is exemplified by the provisions of Directive 2002/21/EC, which establishes a common regulatory framework for electronic communications networks and services, and Council Regulation 1605/2002 on the Financial Regulation Applicable to the General Budget of the European Communities.<sup>66</sup>

Directive 2002/21/EC defines the principles that the Member States must apply when regulating the electronic communications sector.<sup>67</sup> It specifies that where there is no effective competition, the Commission ought to fix Community criteria in order to guarantee the development of a competitive market.<sup>68</sup> Article 8 sets forth the criteria that ought to inform the action of national authorities in the goal of promoting competition in the provision of electronic communication networks and services.<sup>69</sup>

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62. One example comes from the beef sector, European Parliament and Council Regulation 178/2002 establishing a System for the Identification and Registration of Bovine Animals and regarding the Labelling of Beef and Beef Products, 2000 O.J. (L 204) 1. The regulation provides that the measures necessary for the realization of the obligatory system of identification and registration of the animals are to be adopted by national administrations. Thus, the Regulation distinguishes between the phase in which the rule is defined and the monitoring phase, which belong to the supranational level, and the execution phase, which unfolds at the national level.

63. It is understood this way because the European Courts have acted as creators of European law. See M.P. Chiti, *I signori del diritto comunitario: la Corte di giustizia e lo sviluppo del diritto amministrativo*, 2 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 796 (1991).

64. The European Courts, moreover, have always demonstrated a full awareness that the primary competence for the creation of laws belongs to the legislator. See, e.g., Case C-41/69, *ACF Chemiefarma NV v. Commission*, 1970 E.C.R. 661, which goes so far as to note the legislative branch's limited diligence, see also, Case C-130/79, *Express Dairy Foods Ltd. v. Intervention Board for Agricultural Produce*, 1980 E.C.R. 1887.

65. There are two main reasons for this. The first is the need to guarantee uniformity between the different national legal systems (both to enable administrative action to be more efficient, as well as to protect the rights and interests of citizens). Second, judges almost always intervene after a situation has occurred rather than acting preventively.

66. European Parliament and Council Regulation 2002/21/EC, 2002 O.J. (L 108) 33; Council Regulation 1605/2002 on the Financial Regulation Applicable to the General Budget of the European Communities, 2002 O.J. (L 248) 1.

67. European Parliament and Council Regulation 2002/21/EC, 2002 O.J. (L 108) 33.

68. *Id.* at art. 8.

69. *Id.*

First, national authorities must ensure that users derive the maximum benefit in terms of choice, price, and quality. They must ensure that there is no distortion or restriction of competition. They are to encourage efficient investment in infrastructure and promote innovation, as well as the efficient use of radio frequencies and numbering resources.<sup>70</sup> Second, in order to remove obstacles to the provision of electronic communication networks and associated facilities and services, national authorities are charged with encouraging the development of trans-European networks, interoperability of pan-European services, and end-to-end connectivity.<sup>71</sup> They are also charged with ensuring that there is no discrimination in the provision of electronic communication networks and services.

Third, in order to promote the interests of the citizens of the European Union, national authorities should ensure a high level of protection for consumers and their personal data, provide clear information on conditions for using publicly available electronic communications services, and ensure that the integrity and security of public communications networks are maintained. Article 10 provides that the procedures for numbering and assigning national numbering resources be applied with maximum transparency and that equal treatment should be given to all providers of publicly available electronic communications services.<sup>72</sup> Similarly, Article 13 requires that public communication networks and publicly available electronic communication services that have special or exclusive rights for the provision of services in other sectors in the same or another Member State, keep separate accounts for the activities associated with the provision of electronic communication networks or services.<sup>73</sup>

In comparison, Regulation 1605/2002 sets forth general rules and principles to govern the general budget, such as the criteria of sound financial management.<sup>74</sup> Sound financial management is defined in accordance with the principles of economy, efficiency, and effectiveness, and is monitored by performance indicators able to measure the achievement of these objectives.<sup>75</sup> Thus, full information on the performance of the budget and accounting is provided through these criteria.

These two examples demonstrate how Community law now either fixes specific rules and principles for administrative proceedings binding upon Member States, or at least conditions the exercise of administrative activity by the competent national authorities.

The Community legal system has evolved in a way similar (though not identical) to the Member States' legal systems. A common element lies in the lack of a general administrative procedure law and the resulting prominence of extremely specific legal

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70. *Id.*

71. *Id.*

72. *Id.* at art. 10.

73. *Id.* at art. 13. This is only required if the activities are akin to those carried out by legally independent companies or those companies that maintain a structural separation for the activities associated with the provision of electronic communication networks or services.

74. Council Regulation 1605/2002 on the Financial Regulation Applicable to the General Budget of the European Communities, 2002 O.J. (L 248) 1.

75. *Id.*

norms. At the national level, however, this lacuna has led, over time, to the enactment of general laws codifying the principles developed by the courts. In the Community, such a law has yet to materialize.<sup>76</sup> Three characteristics of the Community order can explain this difference. First, the need to limit the discretionary power of administration in the Community has only arisen recently with the demise of indirect administration by the Member States and the emergence of joint, Community-Member State administration. Second, the power exercised by judges has been less a cause for concern in the Community than in traditional national legal orders. Because the Community system does not clearly distinguish between constitutional, legislative, and executive powers, the Court of Justice is viewed as an essential check on the system, rather than an usurper of powers to be exercised by other bodies. Third, integration rather than local autonomy has driven the Community political agenda and hence the need to develop clear legal boundaries guaranteeing national independence has been less pressing in the Community.<sup>77</sup>

It is critical that the process of developing general principles of Community administrative law continue, notwithstanding the marked diversity of supranational administrative proceedings. Because Community law has traditionally been focused on activities relevant to the common market, an asymmetry between the regulation of market-related administrative proceedings and other types of administrative proceedings has developed. Significant differences have emerged, depending on the area of law applicable, differences which demand common general principles, able to serve a unifying function and ensure systemic coherence and uniformity.

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76. Those countries that have developed general procedural laws include Austria, Germany, Spain and Italy. In contrast, the English system lacks general procedure laws. In France, specific laws set forth common principles. For a different view see L. TORCHIA, *I modelli di procedimento amministrativo*, in *IL PROCEDIMENTO AMMINISTRATIVO: PROFILI COMPARATI* 33 (L. Torchia ed., 1993) and S. Cassese, *La disciplina legislativa del procedimento amministrativo*, 5 *FORO ITALIANO* 27 (1993).

77. The most important views to have emerged with respect to the debate on the codification of Community procedural law have been presented by M.P. CHITI, *supra* note 3, at 333.